BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	MM Docket 92-266
Rate Regulation	)	

To: The Commission

PETITION FOR RECONSIDERATION OF SUR CORPORATION

SUR CORPORATION

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SUMMARY

In order to increase the availability of diverse and competitive sources of new video programming on cable television systems, the Commission has been granted power to regulate rates and terms and conditions of service for commercial leased access channels required to be available on cable television systems that have a minimum of 36 activated channels. The rules adopted by the Commission to implement this broad delegation of regulatory power are insufficiently crafted to establish reasonable rates that will result in access for minority programming on cable television systems. The Commission should revisit its analysis of the maximum reasonable rates that cable television systems may adopt for leased commercial access users and should require the rate structure to be offered by cable television systems to reflect the smaller number of subscribers that would be interested in minority programming. Unless cable television systems are required to establish reasonable rates with reference to the potentially smaller audience that minority programmers can reach, the goal of Congress to open up leased commercial access channels for more diverse and more competitive programming will be lost.

Those that have a right under Section 612 of the 1992 Cable Television Act to file complaints over what they believe to be unreasonable rates, terms and conditions of service offered to them by system operators face a high burden of proof to prove by "clear and convincing evidence" that the system operators proposals are unreasonable. Unless the new effort to open up commercial leased

access is to be a dead letter as under the 1984 Cable Act, the Commission must establish specific standards for implementation of discretion over rates by system subscribers and must assure that the manner in which system operators determine which programmers will gain access to leased channels reflects the goal of Congress to enlarge the opportunity for minority and educational programming.

System operators are not required to provide leased commercial access channels in a manner that would adversely affect their financial condition, operation or system development. Protection of cable operator's interest in the use of their facilities by leased commercial access programmers must be regulated and oversight undertaken by the Commission in a manner which also provides a means to assure the reasonable exercise of discretion by cable systems. In particular, the Commission should make plain that a showing of overall substantial financial harm to system operation will occur before system operators may invoke the condition that they not be harmed by leased access rates and terms of service that are otherwise reasonable. A showing of potential inability to maximize profits should be explicitly removed, by rule, as a satisfactory test of adverse financial impact upon the system.

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SUR Corporation (herein "SUR") herewith petitions the FCC to reconsider and amend the Report and Order in this proceeding (hereinafter "Report") released May 3, 1993 (FCC 93-177) relating to leased commercial access (Paragraphs 485-541 of the Report). In particular, SUR urges the Commission to reconsider its reasoning regarding the rates which cable operators may charge for commercial leased access channels, and the standards and procedures by which the Commission reviews disputes between operators and program providers. To assure that diversity of program content on cable systems is achieved through the set aside of channels for commercial leased access, reconsideration of the initial conclusions of the Report is compelled. In support whereof the following is shown:

I. Background And Introduction.

SUR is a 24 hour per day Spanish-language cable programming service devoted primarily to rebroadcasting local newscasts from

over 14 Latin American countries to North and South America through a series of interconnected up and down-linked satellites.[1/] The programming is now provided to over 1 million cable customers in Latin America. It is of particular interest, as well, to minority Hispanic populations in the United States where there are a large number of Hispanic residents and U.S. citizens whose countries of origin are in Latin America and who are otherwise unable to receive the daily diet of local news broadcast from their foreign communities with which they maintain substantial ties and interests. SUR is, itself, owned by Hispanic investors. This unique minority-owned and minority programmed service thus offers the potential to provide a specialized and highly desirable addition to the mix of programming that U.S. cable television operators can make available to communities which contain a significant Hispanic population.

SUR's interest in this proceeding is derived from what it has found to be a limited ability to contract with United States cable television operators for carriage of its service in communities that have substantial Hispanic populations. However, with the

availability of access through the means of leasing commercial channels under the Commissions' commercial leased access rules adopted after passage of the 1992 Cable Competition Television Act, the prospect of opening U.S. cable markets to this diversity enhancing service has been dramatically changed. SUR has a goal of being carried on cable systems that have a Hispanic population of at least 15% in the community serviced by the cable system. Unfortunately, the manner in which these rules will operate will not result in maximum availability of such minority programming on cable television systems unless the rates to be paid by program providers, like SUR, reflect the ability of those programmers to penetrate the minority population served by the cable operators and are otherwise reasonable. Moreover, if cable operators exercise their broad discretion to chose among competing leased commercial access providers by maximizing their economic interests rather than the benefits that new and different service can provide, the legislative goal of using leased access to enhance competition and diversity in cable programming will surely not be achieved.

SUR has not previously participated in this proceeding. It has only recently begun to use the commercial leased access provisions of the Commission's rules to open negotiations with a large number operators and gain access for its service in communities with significant Hispanic populations. It views the commercial leased access provisions of the rules as critical to its ability to gain broad accessibility to cable systems for carriage of its service. Its examination of the Commission's rules adopted

in the Report has raised, however, a large number of serious questions as to how those rules will operate to carry out the purposes of Congress to achieve greater diversity and competition in the provision of programming to cable system subscribers. This Petition for Reconsideration is being submitted in the spirit underlined by the Commission itself in paragraph 491 of the Report that the rules adopted therein are "a starting point that will need refinement both through the rule making process and as [the Commission] address[es] issues on a case by case basis." It is hoped that these comments will aid the Commission to better narrow and comprehend the nature of the issues which are raised by its leased access rules and, if modified as suggested by SUR, herein simplify the process of negotiation for parties seeking leased access as well as simplifying at a future date the resolution of disputes that may, unfortunately, inevitably arise in this area.

Accordingly, the Commission is respectfully requested to reexamine the manner in which the maximum leased commercial access rates are calculated, the means by which cable operators choose among various applicants for commercial leased access, and the dispute resolution procedure which has been set forth in the new rules.[2/]

2/ At the moment, SUR does not take issue with the Commission's handling of such issues as technical support, billing and collecting fees, security deposits, and leased channel placement as discussed in the Report at paragraphs 498-505. Unlike the setting of reasonable rates, these issues can more readily be negotiated and reviewed by the FCC by reference to the marketplace and alternative arms-length standards that have been developed.

II. Cable Operators Must Be Required To Take Account Of Public Interest Factors In Addition To Their Own Economic Interests When Establishing Maximum Rates For Leased Access Channels.

For reasons set forth in paragraphs 512 to 514 of the Report and Order, the Commission has rejected benchmarking, cost of service and marketplace approaches as a means of establishing "the maximum reasonable rates" (Section 612(c)(4)(A)(i)) for commercial leased access to cable systems. Instead, the Commission has adopted a scheme that is intended to calculate the so-called "implicit value" of a cable channel which would then constitute the maximum reasonable rate for commercial leased access channels.

In attempting to establish what would be an implicit fee for the value of the cable channel to be leased to unaffiliated programers, the Commission has divided such programming into three broad categories: (1) programming provided to subscribers directly on a per event or per channel basis; (2) programming provided for more than 50% of the lease time to sell products directly to customers (e.g., Home Shopping Networks, Informercials); and all

of the system subscribers utilize HBO, the implicit fee for the lessee, representing the inherent economic value of the channel, is $10 minus $4 times .25%, equalling an implicit maximum monthly fee per subscriber of $1.50. Thus, if a system serves 100,000 homes and 25,000 subscribe to the HBO service, a similar premium channel lease rate for a premium pay program provider would be derived from one of two calculations. First it might be $1.50 times the number of subscribers who actually subscribe to the second leased service on that system or it might be $37,500, the total of dollars paid by HBO to the system as the implicit fee for access by the program provider to the base of subscribers to the cable system.[3/]

Which of these calculations is the correct one is, of course, critical to a niche or minority oriented commercial leased access programmer that attempts to bring a unique service to a small number of potentially interested subscribers rather than the entire base of subscribers which the cable system serves. Using again the example of HBO, it is apparent that virtually all cable system subscribers will be potential customers of HBO for that general market, mass appeal premium service. However, using the example of SUR, the potential of cable system subscribers who would be interested in becoming its customers is limited necessarily by the

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3/ A third theoretical calculation would multiply $1.50 times the total number of system subscribers, equalling a monthly access fee in the above example of $150,000. That such a fee is beyond reason seems sufficiently clear as to eliminate the need for further discussion of the possibility.

foreign language nature of the programming. Thus, a 100,000 subscriber system in a market that has 20% Spanish speaking

on the system provided by other unaffiliated programmers is not likely to result in a mix of programming that reflects the diversity that motivated the amendments currently in Section 612 of the Act. Secondly, even if the rate which is derived from an HBO-type programmer that is not affiliated with the system is used as the marketplace base to establish maximum reasonable rates, the monopolistic and vertically integrated history of the cable industry precludes the conclusion that such a rate is or ever has been "reasonable." HBO's rates are, for example, uniform on all systems whether or not it has an affiliate relationship with a particular system. If is also owned by one of the largest MSO's. The same pattern of uniform pricing and MSO ownership hold true for a substantial number of cable networks and premium services. To expect such patterns to be a fair guide to maximum reasonable marketplace rates or the implicit value of leased access channels is simply unsupported. Finally, the last sentence of paragraph 519 is so non-directive as to the negotiating behavior of system operators that one is hardly reassured of the ability to negotiate lower rates in the face of limited channel capacity, access demands from competitive programmers who are willing to pay more to reach the entire subscriber base of the cable system, or mere stubbornness by system operators.

It should be emphasized that the commercial leased access provisions, as modified by the 1992 legislation are not a license for cable operators to maximize rates or even to guarantee them profits. To the contrary, the rates must be "reasonable" (Section

612(c)(2); 612(c)(4)(A)(1) and 612(c)(4)(B)) and the cable operator is assured only that it will not be required to charge rates that would be insufficient "to assure that such use will not adversely affect the operating, financial condition or market development of the cable system." Section 612(c)(1). If rates for commercial leased access were not subject to tests of reasonableness that are guided by the essential purpose of opening up cable programming for more diverse and competitive programming, there would have been no reason for either the 1984 cable legislation or the 1992 amendments to Section 612 that thrust the Commission directly into the process of establishing maximum reasonable rates and other terms and conditions of use. To the extent that the Commission has viewed its role in establishing maximum reasonable rates as an exercise

access by unaffiliated programming. After deducting the number of

[redacted]

Secondly, the Commission needs to impose explicit standards for the exercise of discretion by cable operators in negotiating [redacted]

$1.50 implicit HBO rate or 0.30 cents per subscriber per month for SUR's service.

The need to impose on system operators a duty to publish tiers of maximum rates, under the three broad categories of leased access use, before negotiations with potential lessees, is reinforced by the ineffectual enforcement powers the Commission will otherwise have available to it.

Section 612(f) of the 1992 legislation did not modify the 1984 provisions, even though the Commission recommended to Congress that the burden of proof set forth therein be modified. Section 612(f) provides that, in any action brought before a Federal District Court or the Commission there is a "presumption that the price, terms, and conditions for use of channel capacity designed pursuant to subsection (b) are reasonable and in good faith unless shown by clear and convincing evidence to the contrary". In SUR's view the reason that Congress did not amend Section 612(f) as recommended by the Commission was because it saw no need to impose a lesser standard of proof in light of the new requirement that the Commission shall "determine the maximum reasonable rates that a cable operator may establish". Section 612(c)(4)(A)(i). With the establishment by the Commission, under its rule making authority, of the maximum reasonable rates of system operators, guided by the explicit goal of the 1992 legislation to provide "diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems" (Section 612(a)), review of rates and other

terms and conditions of service by cable operators by the Commission can proceed in accordance with the strong showing required of complainants by Section 612(f). If, however, there are no specific, published rational and detailed standards with which system operators must comply, complainants will be effectively handicapped in ever being able to show "by clear and convincing evidence" that the system operator has established unreasonable rates. The calculations provided by the Commission for valuing the implicit value of a channel set forth above are simply too broad and undifferentiated to further the purposes of the legislation or balance the bargaining powers of proposed lessees with those of system operators.[6/] Further refinement of the categories and kinds of service for which proposed lessees can be charged is absolutely essential, as a rule making matter, if the 1992 legislation is not to turn out to be the dead letter that the 1984 legislation was as a vehicle for encouraging the use of commercial leased access channels.

III. System Allocation Of Access Channels To Program Providers Should Be Driven By The Public Interest Factors Of Section 612.

Closely related to the problem of establishing reasonable maximum rates for access to commercial leased channels is the problem of how system operators determine to whom they will lease

facilities when confronted with a greater number of demands for access than they have leased access channels available under the Act. The number of leased access channels that will be available for the public is likely to be quite limited in the immediate future and the dream of an unlimited number of channels available for assignment to those wishing to use them on cable systems through compression techniques, fiber optics and other technologies is not likely to be realized in the near future. Thus, system operators will be confronted with a need to determine on what basis they will confer leased access privileges, on reasonable rates and terms, to a variety of different kinds of program providers.

It is clear that the legislation was designed in the first instance to encourage the use of cable systems as a vehicle for the outlet of additional minority, educational and competitive programming that would not otherwise be able to obtain access to those segments of our population that are otherwise under-served with video programming. There is no other way to read the provisions of Section 612 with its emphasis in 612(a) on these factors as well as the provisions that allow system operators to utilize up to one-third of leased access channels for provision of minority and educational programming, even if they have an ownership interest in such programming. Section 612(i)(1). While the provisions of Section 612(i)(1) are not entirely clear, they do provide a guide to the dominate and overriding purpose of

Section 612 to encourage and facilitate the use of leased access channels for minority and educational use.[7/]

Thus, the Commission should establish that minority and educational programming (as defined in the 1992 Act) carries a priority as against other leased access programmers. System operators must be required, in determining to whom limited capacity may be leased upon reasonable rates and terms, to allow first use for diversity enhancing and Congressionally favored program offerings.

When leased access channel capacity cannot be made available to all qualified proposed minority lessees, further decisional standards should be imposed. Thus, two minority programmers could be subject to tests as to which was to serve the larger minority population in the community, which such population was less well-served with video programming, which programmer was better situated by reason of experience and financial ability and which program service was best directed to otherwise unmet minority needs. A similar approach could be used to distinguish educational or other categories of potential programmers. Unless some such system is

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7/ Section 612(i) is permissive and does not explicitly require system operators to set aside channels for minority or educational use. However, they may set aside one-third of their leased access channels and to have an affiliate relationship with the program provider. Whether this is intended to confer a discretionary benefit on the system operator and act as a spur to the carriage of minority and educational programming or whether it can be viewed as a directive that system operators attempt to set aside one-third of their leased access capacity for that purpose, it is clear

adopted by the Commission which limits system discretion, the legislative goal of diversity and competition will not be achieved and, like with the case of its review of the maximum reasonable rates, the terms and conditions upon which system operators make

simply is a "loss" mandated as a function of the commercial leased access provisions of Section 612. Similarly, the legislation is not intended to allow operators to maximize profits from commercial leased access channels. Therefore, denial of priority status to minority programmers must not be based on the ground that other providers will pay higher rates.[8/] Allowing allocation of channels by ability to pay may work in a theoretically ideal and free

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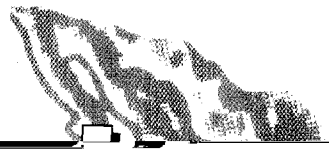

PROGRAMACION SUR*

E.S.T.	LUNES	MARTES	MIERCOLES	JUEVES	VIERNES	SABADO	DOMINGO	E.S.T.
12:00 AM		TV 13 NOTICIAS *(Mexico)* *(Diferido)*						12:00 AM